FEDERAL HOTEL SDN. BHD.

v.

NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH LP
ABDUL RAZAK J
ABDOOLCADER J
[CIVIL APPEAL NO. 45 OF 1982]
14 DECEMBER 1982

ADMINISTRATIVE LAW: *Certiorari - Application to quash Industrial Court Award - Proposal to settle awarded sum by instalments - Treated as non-compliance - Second award - Change of solicitors - Counsel denied permission to address Court - Breach of natural justice - Jurisdiction of Industrial Court.*

This is an appeal against the dismissal of the appellant's application for an order *certiorari* to quash an award made by the Industrial Court on 20 January 1979. The Industrial Court made an award pertaining to a new collective agreement, which on computation a sum of RM400,000 was payable by the appellant as adjustments and arrears of wages on or before 30 November 1978. In view of the deadline imposed, financial hardship and cash flow problems, the appellants' solicitors wrote to the Industrial Court on 18 November 1978 proposing to effect payment by way of four instalments payable between 15 November 1978 and 15 May 1979.

The Industrial Court treated this letter as a written complaint lodged under s. 56(1) for non-compliance with the first award and summoned both the parties before it on 2 December 1978. A second award on 20 January 1979 resulted in the appellant being liable for an additional sum of RM150,000. The Court also ordered the payment of RM200,000 by midnight that very day and the balance on 20 February1979.

During the course of proceedings of the second award there was a change of solicitors for the appellant. Subsequently M/s. Shearn, Delamore & Co. wrote to the Industrial Court on 16 January 1979 to state that they were acting for the appellant and that they would make their submission when the hearing resumed. But on the hearing day the chairman of the Court told the Counsel of the said firm that he could not appear for the appellant and denied him of permission to address the Court.

The appellant's application for *certiorari* to have the second award and all proceedings relating thereto quashed on the grounds that the Industrial Court had no jurisdiction was dismissed by Justice Hashim Yeop A. Sani.

Held:

[1] The Industrial Court had no power to assume jurisdiction in making the second award under either s. 33(2) or 56 both of which did not apply.

[2] It was clearly contrary to natural justice to allow one side to be legally represented but to refuse the right to the other.

[Appeal allowed with costs. Appelant granted certiorari to quash second award.]

Cases referred to:

R. v. Commonwealth Rent Controller, Ex Parte National Mutual Life Association of Australasia Ltd. [1947] 75 CLR 361

Essex County Council v. Essex Incorporated Congregational Church Union [1963] AC 808, 820, 821

Secretary of State for Employment v. Globe Elastic Thread Co. Ltd. [1978] QB 183

Legislation referred to:

Industrial Relations Act 1967, ss. 22, 26, 27, 30(a), 33(1), (2), 56(1), (2), (2)(c)

For the appellant - V.T. Nathan; M/s. Shearn, Delamore & Co.
For the respondent - D.P. Xavier; M/s. D.P. Xavier & Co.

JUDGMENT

The appeal before us involves an application by the appellant for an order of *certiorari* to quash an award made on 20 January 1979 by the Industrial Court in Industrial Court Case No. 200 of 1978 ('the second award') as an aftermath of Award No. 148 of 1978 in Industrial Court Case No. 169 of 1976 made on 7 October 1978 ('the first award'). To obviate prolixity, all references in this judgment to statutory provisions are to the Industrial Relations Act 1967.

It is not necessary to set out in any detail the facts of this matter and it will suffice to only relate the salient facts in so far as they are material to the determination of what is primarily and substantially a point of law in issue in these proceedings. The Minister of Labour and Manpower referred to the Industrial Court a trade dispute between the parties pertaining to a new collective agreement on the expiry of the previous one and the Industrial Court after an extensive hearing made the first award under which on computation some RM400,000 was payable by the appellant to its employees on or before 30 November 1978 as adjustments and arrears of wages. In view of the deadline imposed, the appellant's solicitors wrote a letter to the Industrial Court on 18 November 1978 seeking its indulgence in view of financial hardship and cash flow problems and putting forward a proposal to effect payment of the adjustments and arrears in four instalments payable between 15 November 1978 and 15 May 1979.

On the strength of this letter of 18 November 1978 the Industrial Court immediately registered what it considered a dispute between the parties as a new case and summoned both sides to appear before it on 2 December 1978 on the basis that this letter was a complaint in writing lodged under s. 56(1) for non-compliance with the first award. After some five days of hearing the Industrial Court made the second award on 20 January 1979 which resulted in the appellant being liable for the payment of some RM150,000 in addition to the amount payable under the first award and ordered a sum of RM200,000 to be paid by the appellant forthwith, by midnight that very day, on pain of prosecution, according to the appellant's manager's affidavit and the balance on 20 February 1979 in the sum of RM47,267 as calculated by the respondent.

Another aspect of relevance in this matter is that in the course of the proceedings which culminated in the second award there was a change of solicitors acting for the appellant and Shearn, Delamore & Co. wrote to the Industrial Court on 16 January 1979 to state that they were now acting for the appellant in the matter and gave notice that at the resumed hearing on 20 January 1979 they would formally submit that all proceedings consequent to the first award were void and of no legal effect, but when Counsel from that firm appeared before the Industrial Court on the day in question he was bluntly told by the Chairman that he could not appear for the appellant as no warrant of authority to appear had been applied for under

s. 27. He was denied permission to address the Court on this issue of representation as well as on the substantive issues involved in the matter and the appellant was accordingly without legal representation on that day when a computation of the total arrears to be paid by the appellant was produced to the Industrial Court by the respondent's solicitors with no opportunity to the appellant through its legal representative to comment on or criticise this document.

The appellant then applied for and obtained leave to apply for *certiorari* to have the second award and all proceedings relating thereto quashed on the grounds that the Industrial Court was *functus officio* after handing down the first award and the letter of 18 November 1978 could not operate to confer jurisdiction on it under s. 56 and that the second award was made in breach of natural justice as the appellant was denied legal representation in the circumstances stated earlier. Hashim Yeop A. Sani, J, however, dismissed the substantive motion for *certiorari* on the grounds that the Industrial Court had jurisdiction under s. 33(2) to make the second award and that there was no denial of natural justice as legal representation before the Industrial Court was only a privilege and in any event a representative of the appellant was present throughout the proceedings.

For the purposes of the appeal before us against the order of the learned Judge, it is necessary to consider the jurisdiction of the Industrial Court. The Industrial Court is a creature of statute and must find its jurisdiction within the periphery of the enabling legislation. It is clear that once the Industrial Court has made an award, in this case the first award, it is *functus officio* unless there is a further reference to it by the Minister under s. 26 or unless the provisions of ss. 30(9), 33(1) or (2) or 56 apply.

The Industrial Court held that it had jurisdiction under s. 56 which provides for non-compliance with an award and treated the letter of 18 November 1978 as a compliant lodged under s. 56(1) 'to show non-compliance within time'. We cannot see how s. 56 has any application at all. The first award ordered payment of the adjustments and arrears of wages on or before 30 November 1978 and the letter of 18 November 1978 was written well before that date before there was or could be any non-compliance. Furthermore the letter of 18 November 1978 was not a compliant of non-compliance as, quite apart from the point of time, it only sought the indulgence of the Industrial Court in view of financial exigencies to be tolerant and accede to a request to pay the amount due by four instalments. In any event s. 56(1) speaks of a complaint that any term of an award has not been complied with, *scilicet*, by an aggrieved party where there has been non-compliance and not by an obligor who apprehends he may not when the time comes be able to comply. Even therefore had there been any non-compliance, the appellant could not be the complainant for the purpose of s. 56(1) as this would be brought about by the appellant itself as the offending party. Mr. Xavier for the respondent urges us to give a liberal and what he calls an equitable construction to s. 56(1) to validate in effect a complaint under that provision even before there has been an non-compliance with the first award. We can see no meaning in this suggestion apart from an invitation to so construe and in the process virtually rewrite the terms of s. 56(1) to the extent of mutilating its tense, intent and purpose, and we might add that if such a request can be entertained it would have the ludicrous result of sufflating the prescriptive brocard that 'justice must be seen to be done' with a corollary to the effect that at times 'justice must be seen to be believed' - flying in the face as it would of an express, clear and unambiguous legislative provision for a complaint of non-compliance *in praesenti* and not *in futuro*. The Court is not entitled to treat as ambiguous, with a view to bending their meaning, words that are in themselves clear.

Mr. Xavier contends that the letter of 18 November 1978 read as a whole seeks a variation of the first award and refers to s. 56(2)(c) which provides that the Industrial Court may upon receipt of a complaint under s. 56(1) make such order as it considers desirable to vary or set aside upon special circumstances any term of the award. Section 56(2)(c) only makes provision for power to the Industrial Court to make such an order which is exercisable only upon the receipt of a complaint under s. 56(1). The letter of 18 November 1978 is not such a complaint and there has accordingly been no complaint under s. 56(1) in the present case; there must be a complaint in the first instance as a prerequisite to the exercise by the Industrial Court of its power to make an order under any of the provisions of s. 56(2). The Industrial Court has no power to act *suo motu* under s. 56 without a complaint as required under sub-section (1) of that section. The High Court of Australia in *R. v. Commonwealth Rent Controller, Ex parte National Mutual Life Association of Australasia Ltd.* [1947] 75 CLR 361, issued prohibition in a case where an administrative official, authorised to exercise jurisdiction only upon an application made to him, purported to act *ex mero motu*. It was held in that case that the question whether an application had been made by a tenant for a variation of rent was a preliminary matter which would subject the rent controller to review by the Court. On the terms of s. 56 it is abundantly clear that the power conferred upon the Industrial Court is exercisable in specified circumstances and definitely not otherwise and its purported exercise of power in this case was in breach of the specific statutory limitation on its power which the legislature had intended to be supreme.

Section 30(9) which enables the Industrial Court to rectify any clerical error or mistake in any award arising from any accidental slip or omission has no relevance. Section 33(1) which empowers the Minister to refer any question as to interpretation of an award or for any party to apply for this purpose to the Industrial Court for a decision thereon is not relevant either. This leaves the provisions of s. 33(2) by virtue whereof the Industrial Court may, upon the application of any party, by order vary any of the terms of an award if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty. The learned Judge held that although s. 56 did not apply, s. 33(2) did as there appeared to be some uncertainty in regard to the implementation of the first award and that the Industrial Court therefore had jurisdiction although it purported to proceed under the wrong statutory provision. We must dissent. We cannot see how s. 33(2) can apply as it requires, in order to come into operation, an application by a party to an award to vary any of its terms whereupon the Industrial Court has power to accede thereto only in accordance with the specific provisions thereof. The letter of 18 November 1978 was certainly not such an application and in any event any application for a variation of an award must be made under r. 15 of the Industrial Court Rules, 1967 in Form N of the Schedule thereto. There was no ambiguity or uncertainty in the first award in the circumstances, and if at all there should have been an application for the interpretation thereof under s. 33(1) as provided for in r. 14 of the Industrial Court Rules in Form M in the Schedule thereto. In any event, even assuming for a moment that s. 33(2) could and did apply, s. 33(5) specifically provides that the Industrial Court for the purpose of s. 33 means the Court by which the award was made or any other Court specially constituted under s. 22 for the purpose. The second award was not made by the same Industrial Court which handed down the first award as the composition of two of its members were different, as the record clearly shows, and the Industrial Court which made the second award was not specially constituted either under s. 22 for the purpose of s. 33(2) as it purported to exercise its jurisdiction under s. 56 and not s. 33(2).

We find accordingly that the Industrial Court had no power to assume jurisdiction in making the second award under either s. 33(2) or s. 56, both of which did not apply. Mr. Xavier however also seeks to rely on what he terms the complete acquiescence by the appellant in the proceedings which resulted in the second award. We do not think there was any such acquiescence in the situation thrust on the appellant but in any event jurisdiction does not originate in the consent of the parties and cannot be established, where it is absent, by such consent or acquiescence. It is a fundamental principle that no consent or acquiescence can confer on a Court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such Court or tribunal has acted without jurisdiction (*Essex County Council v. Essex Incorporated Congregational Church Union* [1963] AC 808, 820, 821, (at pp. 820 - 821 per Lord Reid)). This principle that jurisdiction cannot be conferred by agreement or estoppel was firmly reiterated recently by the English Court of Appeal in *Secretary of State for Employment v. Globe Elastic Thread Co. Ltd.* [1978] QB 183, in a decision which was reversed by the House of Lords [1980] AC 506, but affirmed on this point.

It will suffice to deal somewhat briefly with the question of the breach of natural justice in the denial to the appellant of legal representation on 20 January 1979 when the second award was made and we refer in this connection to the circumstances relating thereto we have set out earlier. It is in our view clearly contrary to natural justice to allow one side to be legally represented but to refuse the same right to the other, as in this case. The Industrial Court itself had put in a document specifying the method of conversion to the new wage structure and the appellant had no chance through its legal representative to deal with this and its factual and legal effect before the second award was made. On the day the second award was made and when the appellant's new Counsel was refused permission to act on its behalf and appear and address the Industrial Court a computation was produced by the respondent and again the appellant had no opportunity through its legal representative to comment on or criticise this document. The appellant's new solicitors wrote to the Industrial Court on 16 January 1979, as we have indicated earlier, to give notice that they would appear before it on 20 January 1979 to formally submit that it had no jurisdiction in respect of any proceedings after the first award, taking an entirely new point, and a point of law at that, which had not been raised previously, and again the appellant was denied an opportunity to have this point taken on its behalf. It is abundantly clear that in the circumstances there was a gross violation of the fundamental principles of natural justice and it would be wholly redundant to refer in support of this proposition to the concatenation of cases on this well-established aspect of the matter.

For the reasons we have given we allowed this appeal with costs here and below at the conclusion of argument and granted *certiorari* to quash the second award of the Industrial Court made on 20 January 1979 and ordered the deposit lodged in Court by way of security to be paid out to the appellant.

Also found at [1983] 1 CLJ 67